

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.2 Former Testimony or Statements of Unavailable Witness

A. Admissibility of Former Testimony Under MRE 804(b)(1)

Insert the following text before subsection (B) on page 164:

The content of a 911 call is not testimonial evidence and its admission at trial does not violate a defendant's Sixth Amendment right to confrontation. *Davis v Washington*, 547 US ___, ___ (2006).

In *Davis, supra*, the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during an assault. After objectively considering the circumstances under which the 911 operator "interrogated" McCottry, the Court concluded that the 911 tape on which the victim identified the defendant as her assailant and gave the operator additional information about the defendant was not testimonial evidence barred from admission by the Confrontation Clause. *Id.* at ___. According to the Court:

"[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not *testifying*." *Davis, supra* at ___ (emphasis in original).

In a companion case, *Hammon v Indiana*, the *Davis* Court ruled that a victim's sworn statement regarding an assault was testimonial evidence and was not admissible at trial unless the victim's unavailability resulted from the defendant's wrongful conduct. *Davis (Hammon), supra* at ___.

In *Hammon, supra*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a "reported

domestic disturbance” call at the victim’s home. Amy summarized her responses in a written statement and swore to the truth of the statement. *Id.* at _____. In this case, the Court concluded that the circumstances under which Amy was interrogated closely resembled the circumstances in *Crawford v Washington*, 541 US 36 (2004), and that the “battery affidavit” containing Amy’s statement was testimonial evidence not admissible against the defendant absent the defendant’s opportunity to cross-examine the victim. *Davis (Hammon)*, *supra* at _____. The Court summarized the similarities between the instant case and *Crawford*:

“Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Hammon’s assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.” *Davis (Hammon)*, *supra* at _____ (emphasis in original).

CHAPTER 9

Statutory Firearms Restrictions In Domestic Violence Cases

9.4 Michigan Restrictions That Apply Upon Indictment on Felony or Misdemeanor Charges

C. Exemptions from Licensing Restrictions

Effective July 1, 2006, 2006 PA 75 amends MCL 28.432 to add additional circumstances under which the statutory licensing requirements in MCL 28.422 and MCL 28.429 do not apply. Insert the following text before the bulleted text on page 400:

“(h)* Purchasing, owning, carrying, possessing, using, or transporting an antique firearm. As used in this subdivision, ‘antique firearm’ means that term as defined in section 231a of the Michigan penal code, 1931 PA 328, MCL 750.231a.

“(i) An individual carrying, possessing, using, or transporting a pistol belonging to another individual, if the other individual’s pistol is properly licensed and inspected under this act and the individual carrying, possessing, using, or transporting the pistol has obtained a license under section 5b to carry a concealed pistol.”

*MCL 28.432(1)(h) was added by 2004 PA 99, effective May 13, 2004.